# Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor

HIGH COURT (TAWAU) — CIVIL SUIT NO TWU-22–18/5 OF 2013
ALWI ABDUL WAHAB J
11 JUNE 2018

*Contract — Claims — Claim for debt — Whether plaintiffs' claim caught by res judicata — Whether plaintiffs' action time-barred — Whether defendant liable to pay outstanding debt — Whether placement of order by the plaintiff sham — Whether defendant made offer of sale — Whether defendant unjustly enriched for non-payment of money — Whether there was reduction of outstanding debt*

This was the first and second plaintiffs' claim against the first and second defendants vide their amended statement of claim dated 10 May 2013 for the sum of RM16,859,186.65 with the interest of RM6,223,241. Both the plaintiffs were brothers of Taiwanese nationality who were previously the shareholders and the directors of the first defendant's company. The first defendant was a private limited company incorporated in Malaysia and was operating as a sawmill. The second defendant was a shareholder of the first defendant. By the share sale agreement dated 12 November 1996, the plaintiffs sold and transferred their whole shares in the first defendant to the representative and nominees of the second defendant by the name of Liu Ho Thien. Although the plaintiff were no longer the shareholder of the first defendant, the first defendant was still indebted to the plaintiffs. By a letter of acknowledgment dated 12 November 1996, the first defendant acknowledged and admitted to owing the plaintiffs the sum of RM10,134,000 and interest of 11%pa. The first defendant undertook to pay the said debt due to the plaintiffs by way of supply of timber products manufactured by the first defendant's company within a period of ten months from the date in the letter of acknowledgement on 12 November 1996–11 September 1997. The second defendant then guaranteed the payment made by the first defendant for the said debt together with the agreed interest within the time stipulated in the letter of undertaking. The plaintiffs' suit was first initiated in 1997 in the High Court in Suit No T (22) 12 of 1997 ('the 1997 Suit'). In the 1997 Suit, the plaintiffs claimed for the principal sum of RM6223,241 with the interest of 11%pa based on the same letter of acknowledgement dated 12 November 1996 issued by the first defendant and the letter of undertaking dated 12 November 1996 issued by the second defendant. The plaintiffs' claim was then dismissed as the High Court found that the plaintiffs' action was premature as the plaintiffs had only concluded one order for the timber products with the first defendant out of four orders as contemplated under the

letter of acknowledgement. Dissatisfied with the decision of the High Court, the plaintiffs then filed an appeal to the Court of Appeal which overturned the decisions of the High Court on the basis that the parties could not agree on the price of the timber products and there was no provision in the letter of acknowledgement to settle such disagreement. The agreement and the letter of acknowledgement was regarded as frustrated. On appeal, the Federal Court ruled that the Court of Appeal could not have considered the issue of frustration as it was never been pleaded in the pleadings. Pursuant to the decision of the Federal Court, the plaintiffs then filed the present suit against the defendants for the same principal sum of RM6,223241.10 with the interest of 11%pa based on the letter of acknowledgement of debt dated 12 November 1996 issued by the first defendant and the letter of undertaking dated 12 November 1996 issued by the second defendant. It was not disputed that the parties had only concluded one contract for sale of timber products at a mutually agreed price and the debt was reduced to the sum of RM6,223,241 after having set off and debited the amount under that one concluded sale. The issues by the plaintiff were: (a) whether the plaintiffs' claim caught by res judicata; (b) whether plaintiff's action was time-barred; (c) whether the defendant was liable to pay the outstanding debt; (d) whether the placement of order by the plaintiff was a sham order; (e) whether offer for sale must be made by the defendant; (f) whether the defendant was unjustly enriched for non-payment of money; and (g) whether there was reduction of outstanding debt by the defendant.

**Held**, dismissing the plaintiff's claim with costs of RM10,000 subject to the payment of allocator:

(1) It was pertinent to note that there was a striking out application filed by the defendants against the plaintiff's claim in the present suit and the matter went up to the Federal Court where the defendants' leave application to appeal against the Court of Appeal's decision in dismissing the striking out order given by the High Court was also dismissed. The Federal Court was of the view that the principle of res judicata had no application in the present case. Based on the principle of stare decisis, the plaintiff's claim was not caught by the doctrine of res judicata. Although the orders were not made within the ten months stipulated period under the letter of acknowledgment, there was no bar for the plaintiffs from recovering the debt against the defendants due to the absence of any provision regarding the extinguishment of the debt by the failure of the plaintiffs to place the necessary orders for timber products from the first defendant within the stipulated period (see paras 64–65 & 67).

(2) The present suit was not time-barred as the parties were actively involved in the process of litigation in the 1997 Suit when the said suit was filed until it was finally decided on 7 September 2009 by the Federal Court. The present suit dated 10 May 2013 which was filed within six years after

A the matter was disposed off by the Federal Court in 2009. It was not disputed that the present suit went through another round of appeal to the Federal Court on the issue of striking out filed by the defendants against the plaintiffs' action on the ground of res judicata. The defendants had filed their review application to the Federal Court after the Federal Court refused their leave application to appeal in 2017 whilst the plaintiff were still pursuing and defending their rights. The parties' actions had effectively suspended the operation of the limitation period for the present suit (see paras 73–75).

C (3) The court was on the view that although the debts were admitted, the payment was only based on the agreed term of the letter of acknowledgement that was by way of contra and set off against the purchase price of the sale and supply of timber products over the period of ten months. On whether the defendants were liable to the admitted debt based on the letter of acknowledgement and the letter of undertaking was depending upon whether there were sufficient sales concluded over the period of ten months from the date of the letter of acknowledgment. This was because no payment could be made by way of contra and set off if there was no sale of the timber products in the first place. The defendant could not be liable to pay the outstanding debt based on the letter of undertaking when only one sale was concluded (see paras 85 & 87–88).

(4) The plaintiffs' order was a sham order using the term under cl 5 of the letter of acknowledgement as a tactical manoeuvre to claim for cash payment despite the fact that it was made beyond the timeline and their knowledge of the closing down of the first defendant sawmill factory at the time when the order was placed. The plaintiff failed to prove through the evidence of their witnesses on the purported order for the remaining timber products. Although the said order in 2012 was pleaded by plaintiff and despite the clear admission by the defendants on the closing down of the first defendant's sawmill, it did not obviate the plaintiffs from the need to present evidence in court (see paras 113–115).

(5) The court was more inclined to agree with the defendants' interpretation of cl 2 of the letter of acknowledgement that orders must be made first by the plaintiffs before the first defendant could supply the timber products otherwise the first defendant would not be in the position to know what types of timber products or their quantities that were required or needed by the plaintiffs at any particular point of time without making the enquiry and confirmed the order (see para 126).

(6) The plaintiffs could not succeed in their claim based on the equitable principle of unjust enrichment as the nature of the claim in the present case was different. The present suit was based on the admitted debt payable by way of contra payment and set off against the sale and supply

of the timber products by the first defendant. There was no payment made by the first defendant because there was no sale of timber product concluded between the first defendant and the plaintiffs. There was no act or delivery of thing that could be said done by the plaintiffs which were not intended to be done gratuitously that had benefitted the defendant (see paras 133–135).

(7) There was no evidence at all adduced by the first plaintiff to show that all expenses had been cleared or deducted before 12 November 1996. As the plaintiffs' claim could not have been sustained, the issue on whether the outstanding debts due from the first defendant was RM6,223,241 or on a reduced sum of RM5431,545.87 was inconsequential (see paras 146 & 148).

**[Bahasa Malaysia summary**

Ini adalah tuntutan plaintif pertama dan kedua terhadap defendan pertama dan kedua melalui penyataan tuntutan yang dipinda mereka bertarikh 10 Mei 2013 untuk jumlah RM16,859,186.65 dengan faedah RM6,223,241. Kedua-dua plaintif adalah adik-beradik dari Taiwan yang pernah menjadi pemegang saham dan pengarah syarikat defendan pertama. Defendan pertama adalah syarikat swasta yang diperbadankan di Malaysia dan beroperasi sebagai kilang papan. Defendan kedua adalah pemegang saham defendan pertama. Dengan perjanjian penjualan saham bertarikh 12 November 1996, plaintif menjual dan memindahkan seluruh saham mereka dalam defendan pertama kepada wakil dan penama defendan kedua dengan nama Liu Ho Thien. Walaupun plaintif tidak lagi menjadi pemegang saham defendan pertama, defendan pertama masih berhutang dengan plaintif. Dengan surat pengakuan bertarikh 12 November 1996, defendan pertama mengakui dan menerima berhutang kepada plaintif sebanyak RM10,134,000 dan faedah 11% setahun. Defendan pertama menjamin untuk membayar hutang tersebut kepada plaintif dengan cara membekalkan produk kayu yang dibuat oleh syarikat defendan pertama dalam tempoh sepuluh bulan dari tarikh surat pengakuan pada 12 November 1996–11 September 1997. Defendan kedua kemudian menjamin pembayaran yang dibuat oleh terdakwa pertama untuk hutang tersebut bersama dengan kepentingan yang dipersetujui dalam masa yang ditetapkan dalam surat akujanji. Guaman plaintif pertama kali dimulakan pada 1997 di Mahkamah Tinggi dalam Guaman No T (22) 12 Tahun 1997 ('Guaman 1997'). Dalam Guaman 1997, plaintif mendakwa jumlah pokok sebanyak RM6223,241 dengan faedah 11% setahun berdasarkan surat pengakuan yang sama bertarikh 12 November 1996 yang dikeluarkan oleh defendan pertama dan surat akujanji bertarikh 12 November 1996 yang dikeluarkan oleh defendan kedua. Tuntutan plaintif kemudiannya ditolak kerana Mahkamah Tinggi mendapati bahawa tindakan plaintif adalah pra-matang kerana plaintif hanya membuat penyelesaian satu pesanan untuk produk kayu dengan defendan pertama daripada empat pesanan seperti yang

dipertimbangkan di bawah surat pengakuan. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, plaintif kemudian memfailkan rayuan ke Mahkamah Rayuan yang membatalkan keputusan Mahkamah Tinggi atas dasar bahawa pihak-pihak tidak dapat menyepakati harga produk kayu dan tiada peruntukan dalam surat pengakuan untuk menyelesaikan ketidaksepakatan tersebut. Perjanjian dan surat pengakuan itu dianggap gagal. Atas rayuan, Mahkamah Persekutuan memutuskan bahawa Mahkamah Rayuan tidak dapat mempertimbangkan isu kegagalan kerana ia tidak pernah diplidkan dalam pliding tersebut. Selaras dengan keputusan Mahkamah Persekutuan, plaintif kemudian memfailkan saman ini terhadap defendan untuk jumlah pokok yang sama iaitu RM6,223241.10 dengan faedah 11% setahun berdasarkan surat pengakuan hutang bertarikh 12 November 1996 yang dikeluarkan oleh defendan pertama dan surat akujanji bertarikh 12 November 1996 yang dikeluarkan oleh defendan kedua. Ia tidak dipertikaikan bahawa pihak-pihak hanya membuat penyelesaian satu kontrak untuk penjualan produk kayu pada harga yang dipersetujui bersama dan hutang itu dikurangkan kepada jumlah sebanyak RM6,223,241 selepas menolak dan mendebit jumlah di bawah penjualan yang diselesaikan itu. Isu-isu oleh plaintif adalah: (a) sama ada tuntutan plaintif ditangkap oleh res judicata; (b) sama ada tindakan plaintif telah dihalang had masa; (c) sama ada defendan bertanggungjawab membayar hutang tertunggak; (d) sama ada penempatan pesanan oleh plaintif adalah pesanan palsu; (e) sama ada tawaran jualan mesti dibuat oleh defendan; (f) sama ada defendan telah diperkaya secara tidak adil untuk tidak membayar wang; dan (g) sama ada terdapat pengurangan hutang tertunggak oleh defendan.

**Diputuskan**, menolak tuntutan plaintif dengan kos RM10,000 tertakluk kepada pembayaran allocator:

(1) Adalah penting untuk diperhatikan bahawa terdapat permohonan pembatalan yang difailkan oleh defendan terhadap tuntutan plaintif dalam guaman ini dan perkara tersebut pergi ke Mahkamah Persekutuan di mana permohonan kebenaran defendan untuk merayu terhadap keputusan Mahkamah Rayuan dalam menolak pesanan pembatalan yang diberikan oleh Mahkamah Tinggi juga ditolak. Mahkamah Persekutuan berpendapat bahawa prinsip res judicata tidak mempunyai penggunaan dalam kes ini. Berdasarkan prinsip stare decisis, tuntutan plaintif tidak ditangkap dengan doktrin res judicata. Walaupun pesanan itu tidak dibuat dalam tempoh sepuluh bulan yang ditetapkan dalam surat pengakuan, tiada halangan bagi plaintif untuk mendapatkan kembali hutang terhadap defendan disebabkan ketiadaan sebarang peruntukan mengenai penghapusan hutang oleh kegagalan plaintif untuk meletakkan pesanan yang diperlukan untuk produk kayu daripada defendan pertama dalam tempoh yang ditetapkan (lihat perenggan 64–65 & 67).

(2) Guaman ini tidak dihalang had masa kerana pihak-pihak terlibat secara aktif dalam proses litigasi dalam Guaman 1997 apabila saman tersebut difailkan sehingga akhirnya ia diputuskan pada 7 September 2009 oleh Mahkamah Persekutuan. Guaman ini bertarikh 10 Mei 2013 yang difailkan dalam tempoh enam tahun selepas perkara itu dilupuskan oleh Mahkamah Persekutuan pada tahun 2009. Ia tidak dipertikaikan bahawa guaman sekarang telah melalui satu lagi rayuan ke Mahkamah Persekutuan mengenai isu pembatalan yang difailkan oleh defendan terhadap tindakan plaintif atas alasan res judicata. Defendan telah memfailkan permohonan semakan mereka kepada Mahkamah Persekutuan selepas Mahkamah Persekutuan menolak permohonan kebenaran mereka untuk merayu pada 2017 sementara plaintif masih meneruskan dan mempertahankan hak mereka. Tindakan pihak-pihak telah menggantung operasi had masa untuk guaman sekarang (lihat perenggan 73–75).

(3) Mahkamah berpendapat bahawa meskipun hutang itu diterima, pembayaran itu hanya berdasarkan terma yang dipersetujui surat pengakuan yang dengan cara kontra dan penolakan terhadap harga pembelian penjualan dan pembekalan produk kayu atas tempoh sepuluh bulan. Mengenai sama ada defendan bertanggungjawab kepada hutang yang diakui berdasarkan surat pengakuan dan surat akujanji bergantung kepada sama ada terdapat jualan mencukupi yang diselesaikan sepanjang tempoh sepuluh bulan dari tarikh surat pengakuan. Ini kerana tiada bayaran boleh dibuat dengan cara kontra dan penolakan jika tiada jualan produk kayu pada mulanya. Defendan tidak boleh bertanggungjawab untuk membayar hutang tertunggak berdasarkan surat akujanji apabila hanya satu jualan diselesaikan (lihat perenggan 85 & 87–88).

(4) Pesanan plaintif adalah pesanan palsu yang menggunakan terma di bawah klausa 5 surat pengakuan sebagai manuver taktikal untuk menuntut bayaran tunai walaupun hakikatnya ia dibuat di luar garis masa dan pengetahuan mereka tentang penutupan kilang papan defendan pertama pada masa pesanan itu diletakkan. Plaintif gagal membuktikan melalui keterangan saksi mereka mengenai pesanan yang dikatakan untuk produk balak yang masih ada. Walaupun pesanan tersebut pada tahun 2012 telah diplidkan oleh plaintif dan meskipun pengakuan yang jelas oleh defendan pada penutupan kilang papan defendan pertama, ia tidak menyingkirkan plaintif daripada keperluan untuk mengemukakan keterangan di mahkamah (lihat perenggan 113–115).

(5) Mahkamah lebih cenderung untuk bersetuju dengan tafsiran defendan bagi klausa 2 dari surat pengakuan bahawa pesanan harus dibuat terlebih dahulu oleh plaintif sebelum defendan pertama dapat membekalkan produk kayu jika tidak defendan pertama tidak akan berada di

kedudukan untuk mengetahui jenis produk kayu atau kuantiti yang mereka diperlukan oleh plaintif pada suatu masa tertentu tanpa membuat siasatan dan mengesahkan pesanan (lihat perenggan 126).

(6) Plaintif tidak dapat berjaya dalam tuntutan mereka berdasarkan prinsip ekuiti pengkayaan tak adil kerana sifat tuntutan dalam kes sekarang adalah berbeza. Guaman sekarang adalah berdasarkan hutang yang diakui sebagai bayaran kontra dan penolakan terhadap penjualan dan pembekalan produk kayu oleh defendan pertama. Tiada pembayaran yang dibuat oleh defendan pertama kerana tiada penjualan produk kayu yang diselesaikan antara defendan pertama dan plaintif. Tiada tindakan atau penyampaian perkara yang boleh dikatakan dilakukan oleh plaintif yang tidak bertujuan untuk dilakukan secara percuma yang telah memberi manfaat kepada defendan (lihat perenggan 133–135).

(7) Tiada keterangan sama sekali diberikan oleh plaintif pertama untuk menunjukkan bahawa semua perbelanjaan telah dibersihkan atau ditolak sebelum 12 November 1996. Memandangkan tuntutan plaintif tidak dapat dikekalkan, isu sama ada hutang tertunggak yang terhutang daripada defendan pertama ialah RM6,223,241 atau pada jumlah yang dikurangkan sebanyak RM5431,545.87 adalah tidak penting (lihat perenggan 146 & 148).]

**Notes**

For cases on claim for debt, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4461–4463.

**Cases referred to**

*Central Bank of India v Hartford Fire Insurance Co Ltd* [1965] AIR SC 1288, SC (refd)

*National Coal Board v WM Neill & Son (St Helens) Ltd* [1984] 1 All ER 555, QBD (refd)

*Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 3 CLJ Rep 37, HC (refd)

*Tang Meng Hock v Tang Ming Seng* [2010] 1 MLJ 33, CA (refd)

*The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613, CA (refd)

*Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478, FC (refd)

**Legislation referred to**

Limitation Ordinance (Cap 72) Schedule, item 95

*Roland Cheng (Roland Cheng & Co) for the first and second plaintiffs.*
*Victor Chong (Poh & Victor Chong) for the first and second defendants.*

**Alwi Abdul Wahab J:**

INTRODUCTION

**[1]** This is the first and second plaintiffs' claim against the first and second defendants vide their amended statement of claim dated 10 May 2013 (as amended on 15 May 2017) for the sum of RM16,859,186.65 (RM6,223,241 + RM10,635,945,65) as at 10 May 2013, interest at the rate of 11%pa on the sum of RM6,223,241 calculated on day to day basis from 10 May 2013 until the date of full payment, solicitors fees on a solicitor and client basis, costs and any other reliefs this court deems fit and proper.

**[2]** Both the first plaintiff and the second plaintiff are brothers of Taiwanese nationals who were previously the shareholders and the directors of the first defendant's company.

**[3]** The first defendant ie Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) was a private limited company incorporated in Malaysia and was operating as a sawmill. The business of the first defendant has stopped operation and closed down sometime in July 1998.

**[4]** The second defendant ie Dutaland Bhd (formerly known as Mycom Bhd) is a shareholder of the first defendant.

**[5]** In this judgment, both the first and second plaintiffs are collectively referred to as the plaintiffs unless if necessary they would be referred to as the first plaintiff and second plaintiff respectively. Likewise, the first and second defendants are collectively referred to as the defendants unless if necessary they would be referred to as the first defendant and second defendant respectively.

**[6]** During the trial, both the plaintiffs namely Lin Wen Chih ('PW1') and Lin Wen Chuan ('PW2') gave evidence. For the defendants, the witnesses are Ng Ju Siong (DW1) and Tan Kim Chuan @ Tan Say Lay (DW2).

**[7]** On the 11 June 2018, having heard the evidence and considered the submission from both parties, I found that the plaintiffs had failed to prove its case on the balance of probabilities. Hence, I dismissed the plaintiffs' claim with costs of RM10,000 to the defendants subject to the payment of allocatur. I shall now give my full grounds of decision.

THE FACTUAL BACKGROUND OF THE CASE

**[8]** There is a chequered history to this plaintiffs' claim as it has already been to both the Court of Appeal and the Federal Court twice in the past.

**[9]** The events which led to the present action transpired nearly twenty- two years ago when the plaintiffs' suit was first initiated in 1997 in the High Court ie Suit No T (22) 12 of 1997 dated 22 November 1997 ('the 1997 Suit').

**[10]** By the share sale agreement dated 12 November 1996 (see pp 1–14 of DBOD) the plaintiffs sold and transferred their whole shares in the first defendant to the representative and nominee of the second defendant by the name of Liu Ho Tien.

**[11]** Although the plaintiffs are no longer the shareholders of the first defendant, the first defendant was at that material time still indebted to the plaintiffs. By a letter of acknowledgment dated 12 November 1996 ('letter of acknowledgment'), the first defendant acknowledged and admitted to owing the plaintiffs the sum of RM10,134,000 ('the said debt') and interest on the outstanding sum at 11%pa. The letter of acknowledgment can be found at pp 16–17 of DBOD.

**[12]** Through the same letter of acknowledgment, the first defendant undertook to pay the said debt due to the plaintiffs by way of supply of timber products manufactured by the first defendant's company to be deducted and set off against the said outstanding debt owed to the plaintiffs within a period of ten months from the date in the letter of acknowledgement ie 12 November 1996–11 September 1997 and to be delivered over four shipments.

**[13]** For ease of convenience, the first defendant's letter of acknowledgement of debt is reproduced as follows:

> 12 November 1996 Our Ref: FIN/96/L/0080
>
> To: Lin Wen-Chuan & Lin Wen-Chih both of KM9, Jalan Apas Tawau, Sabah
>
> Dear Sirs,
>
> Re: Outstanding sum of RM 10,134,000.00 and Provision for taxation of RM3,295,453.00
>
> We refer to the above and hereby acknowledge that a sum of RM10,134,000.00 ('the Outstanding Sum') as agreed on 28/8/96 is presently owing by us to you in the following proportion:
>
> (1) Lin Wen-Chuan — RM5,134,000.00
> *and*
> (2) Lin Wen-Chih — RM5,000,000.00
>
> *We hereby confirm and undertake with you as follows:*
>
> 1. we shall pay you interest on the Outstanding Sum or the balance thereof outstanding from time to time on monthly rests at the rate of eleven per

centum (11%) per calculated day to day from today to the date of full payment thereof ('the Agreed Interest');

2. we shall sell and you shall purchase timber products manufactured by us ('the Timber Products') at a price consistent with the prevailing market price and costing the same amount as the Outstanding Sum plus the Agreed Interest ('the Timber Products Price') from us over a period of ten (10) months from today and to be delivered over four (4) shipments;

3. the Timber Products Price shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest;

4. subject to item 5 hereinafter contained, the Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set-off against the Timber Products Price;

5. in the event that we shall fail, refuse and/or neglect to supply any of the Timber Products ordered by you or if any of the Timber Products supplied by us shall not be in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the Timber Products or replace the defective Timber Products and we have failed to do so, to cancel the order for such Timber Products or reject such Timber Products. Upon the order for such Timber Products being cancelled or such Timber Products being rejected and returned to us, we shall then pay cash in lieu of such Timber Products to you and such cash payment shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest; and

6. in the event that the final amount of income tax payable by us as assessed and raised by the Director General of Inland Revenue for the period up to and including the 30th day of September, 1995 shall be less than the provision for taxation in our accounts ie RINGGIT MALAYSIA THREE MILLION TWO HUNDRED AND NINETY-FIVE THOUSAND FOUR HUNDRED AND FIFTY THREE (RM3,295,453.00) only, we shall pay the difference thereof to you within FOURTEEN (14) days of receipt of the final notice of assessment from the Director General of Inland Revenue for the appropriate tax relief/rebate within THIRTY (30) days after completion of the Share Sale Agreement dated 12/11/96 between yourselves, Lin Wen-Fu and Lin Wen-Cheng jointly and severally of the one part and Liu Ho-Tien of the other part and keep you informed of such application from time to time.

Yours faithfully,

.....

Bobby Yeap Managing Director

cc: file

**[14]** The second defendant in their letter dated 12 November 1996 to the plaintiffs guaranteed the payment to be made by the first defendant for the said

debt together with the agreed interest within the time stipulated in the letter of acknowledgement ('letter of undertaking').

**[15]** Similarly, for ease of convenience, the second defendant's letter of undertaking is reproduced as follows:

> 12 November 1996 Lin Wen Chuan & Lin Wen Chih
>
> both of KM 9 Jalan Apas Tawau
>
> Sabah
>
> Dear Sirs
>
> RE: OUTSTANDING SUM OF RM10,134,000 PAYABLE TO YOU BY PACIFIC FOREST INDUSTRIES SDN BHD (FORMERLY KNOWN AS VERAMAX SDN BHD) ('THE COMPANY')
>
> In consideration of you selling your 7,500,000 ordinary shares fully paid-up in the Company to Liu Ho-Tien ('Purchaser') and for this purpose to enter into a Share Sale Agreement with the Purchaser upon such terms and conditions as are therein contained, we hereby guarantee the payment of the Timber Products Price and The Agreed Interest by the Company to you within the time stipulated in the letter of even date from the Company to you ('the Company's Letter').
>
> In the event that the Company shall fail to pay you the Timber Products Price and/or The Agreed Interest in full by the time stipulated in the Company's Letter, we shall pay you the same or any balance thereof then outstanding within fourteen (14) days from our receipt of written notice from you to do so.
>
> Words and expression used herein shall have the same meaning and intent as in the Company's Letter.
>
> Yours faithfully MYCOM BERHAD
>
> DATO' YAP YONG SEONG
>
> Group Managing Director

*The 1997 Suit*

**[16]** The plaintiffs had earlier filed Suit No T (22) 12 of 1997 dated 22 November 1997 against the first and second defendants claiming for the principal sum of RM6,223,241 and agreed interest at the rate of 11%pa based on the same letter of acknowledgment dated 12 November 1996 issued by the first defendant and the letter of undertaking dated 12 November 1996 issued by the second defendant.

**[17]** The 1997 Suit went on full trial in the High Court and after the conclusion of the trial, the plaintiffs' claim was dismissed on 29 July 2000. The High Court found that the plaintiffs' action was premature because it held that the plaintiffs had only concluded one order for the timber products with the

first defendant out of four orders as contemplated under the letter of acknowledgement.

**[18]** Dissatisfied with the said decision of the High Court, the plaintiffs filed an appeal to the Court of Appeal under Civil Appeal No S-02–564 of 2000.

**[19]** On 29 March 2007, the Court of Appeal allowed the plaintiffs' appeal and overturned the said decision of the High Court on the basis that the parties could not agree on the price of the timber products and there was no provision in the letter of acknowledgement to settle such disagreement. Hence, the agreement as per the letter of acknowledgement was regarded as frustrated.

**[20]** Dissatisfied with the said decision of the Court of Appeal, the first and second defendants further appealed to the Federal Court under Civil Appeal No 02(f)-32 of 2008(S).

**[21]** On 7 September 2009, the Federal Court allowed the appeal filed by the first and second defendants, set aside the decision of the Court of Appeal and upheld the decision of the High Court. The Federal Court ruled that the Court of Appeal could not have considered the issue of frustration as it was never been pleaded in the pleadings. Hence, the decision of the High Court in the 1997 Suit was reinstated and upheld.

SUIT NO TWU-22–18/5 OF 2013 ('THE PRESENT SUIT')

**[22]** Pursuant to the decision of the Federal Court, the plaintiffs then filed the present suit against the first and second defendants via the plaintiffs' statement of claim dated 10 May 2013 (as amended on 15 May 2017) and also claiming for the same principal sum of RM6,223,241.10 plus interest at the rate of 11%pa based on the letter of acknowledgement of debt dated 12 November 1996 issued by the first defendant and the letter of undertaking dated 12 November 1996 issued by the second defendant.

**[23]** Under the present suit the plaintiffs are claiming that first defendant has failed to supply the timber products ordered by the plaintiffs vide purchase order dated 23 October 2012 in the total price of RM6,223,241. As a result, the plaintiffs issued a notice dated 31 October 2012 to the first defendant requesting the first defendant to ship the timber products as ordered within 30 days from the date of the said notice. Despite the lapse of the 30 days period, the first defendant has still failed to ship the timber product which led to the issuance of a letter of cancellation by the plaintiffs dated 5 December 2012 to cancel the purchase order and demanding the immediate payment of the said debt of RM6,223,241 from the first defendant by way of cash.

**[24]** On the 20 August 2013, the defendants applied to strike out the present suit on the ground of res judicata as it was the position taken by the defendants that similar claim had already been adjudicated in the 1997 Suit. The High Court allowed the striking out application on 11 March 2014.

**[25]** On 14 March 2014, the plaintiffs filed an appeal to the Court of Appeal against the said striking out order on the basis that the principle res judicata does not apply to the present suit. The plaintiffs contended that the High Court in the said 1997 Suit had merely found that the plaintiffs' claim was premature and its merits were not heard and considered. The plaintiffs' appeal was allowed on 20 September 2016.

**[26]** Thereafter, the defendants had on 17 October 2016 filed an application for leave to appeal to the Federal Court against the said Court of Appeal's decision. The hearing of the leave application was heard on 10 November 2017 and it was finally dismissed.

**[27]** It is not disputed that the parties had only concluded one contract for sale of timber products at a mutually agreed price on 6 September 1997 (p 108 PBOD). The said debt is thereafter reduced to the sum of RM6,223,241 after having set off and debited the amount under that one concluded sale.

**[28]** However, the first defendant by a letter dated 10 November 1997 only admitted owing to the plaintiffs the sum of RM5,431,454.87.

THE DEFENDANTS' DEFENCE

**[29]** The defendants raised several issues in their amended defence and among others; the plaintiffs are not entitled to their claim because the plaintiffs have breached cl 2 of the letter of acknowledgement by not placing four orders for the supply of the timber products from the first defendant within the said ten months' period for the first defendant to effect the contra payment and set off.

**[30]** It was the defendants' defence that the plaintiffs' action is caught by the doctrine of res judicata.

**[31]** The defendants has also set up the defence of limitation.

**[32]** The defendants argued that the placement of order by the plaintiffs by way of purchase order dated 23 October 2012 is a sham order as it was time-barred after some 16 years from the date of the letter of acknowledgement dated 12 November 996. Under the term of the letter of acknowledgement, the plaintiffs' orders must be concluded within the ten months' period from the

date of the said letter of acknowledgement.

THE ISSUES FOR DETERMINATION

**[33]** Both the plaintiffs and the defendants filed their own set of proposed issues for trial as they were unable to agree on one set of common issues.

**[34]** The plaintiffs had listed down their proposed issues to be tried as follows:

(a) whether cl 2 of the letter of acknowledgement requires the first defendant to first offer for sale and then for the plaintiffs to purchase the timber products?

(b) whether the first defendant's admitted debt of RM10,134,000 as at 12 November 1996 was reduced to RM5,431,454.87 or RM6,223,241 as at 15 September 1997?

(c) whether the first defendant's failure to fulfil the three remaining orders for timber products under the first defendant's letter dated 12 November 1996, is a self-induced frustration? and

(d) whether the first and second defendants would be unjustly enriched for non-payment of the monies admitted to be due to the plaintiffs in the first defendant's letter of acknowledgement dated 12 November 1996?

**[35]** The defendants' proposed issues to be tried are as follows:

(a) whether the plaintiffs' action is caught by the doctrine of res judicata?

(b) whether the plaintiffs' claim is time-barred under the provision of the Sabah Limitation Ordinance?

(c) whether the plaintiffs are guilty of laches and thus not entitled to relief from this honourable court?

(d) whether the first defendant is liable to pay the plaintiffs in cash under the said the letter of acknowledgement?

(e) whether the second defendant is liable under the letter of undertaking?

(f) if the defendants are liable, whether the outstanding debt had been reduced to RM5,431,454.87 instead of RM6,223,241 as contended by the plaintiffs?

(g) whether the plaintiffs are relieved of their obligations under the said letter of acknowledgement to place orders and to agree on the price for the remaining three shipments of timber products upon the expiry of the said period on account of frustration and the first defendant (and the

second defendant as guarantor) immediately becoming liable to the plaintiffs for the value of the balance of the timber products and interest and costs?

(h) in the alternative, whether the arrangement for payment of the outstanding debt on the letter of acknowledgement is void or voidable in law?

(i) if the arrangement for payment of the outstanding debt on the said letter of acknowledgement is void or voidable in law, whether compensation or restoration in monies term ought to be made by the first defendant (and the second defendant as guarantor)? and

(j) in the alternative, whether the plaintiffs are entitled to succeed in their claim on the ground that the first defendant (and the second defendant as guarantor) had been unjustly enriched?

**[36]** Based on the background facts of the case and having examined the above issues as listed down by the plaintiffs and defendants, I am of the view that the main issues are essentially as follows:

(i) whether the plaintiffs' action is caught by the doctrine of res judicata?

(ii) whether the plaintiffs' claim is time-barred under the provision of the Sabah Limitation Ordinance?

(iii) whether the first and second defendants are liable to pay the outstanding debt based on the said letter of acknowledgement and letter of undertaking when only one sale was completed?

(iv) whether there were three other orders placed by the plaintiffs in addition to the one concluded sale which were not materialised either because of the first defendant refused to sell the timber products or the first defendant quoted a high price than its usual price?

(v) if the issue in (iv) is proven, whether the first defendant's failure to fulfil the three remaining orders for timber products under the first defendant's letter dated 12 November 1996, is a self-induced frustration?

(vi) whether the placement of order by the plaintiffs made on 23 October 2012 is a sham order?

(vii) whether cl 2 of the letter of acknowledgement requires the first defendant to first offer for sale and then for the plaintiffs to purchase the timber products?

(viii) whether the first and second defendants would be unjustly enriched for non-payment of the monies admitted to be due to the plaintiffs in the first defendant's letter of acknowledgement dated 12 November 1996? and

(ix) if the defendants are liable, whether the outstanding debt had been reduced to RM5,431,454.87 instead of RM6,223,241 as at 15 September 1997 contended by the plaintiffs?

*Whether the plaintiffs' action is caught by the doctrine of res judicata?*

**[37]** The plaintiffs submitted that the principle of res judicata does not apply because the previous High Court had dismissed the 1997 Suit on the ground of 'premature claim' which means that the plaintiffs had yet to place the remaining orders for the timber products from the first defendant. Hence, the merits of the said 1997 Suit were not fully tried and this present suit is necessary to litigate the issues again. Although the finding of the High Court was overturned by the Court of Appeal, it was finally affirmed and upheld by the Federal Court.

**[38]** The plaintiffs contended that based on the judgment of the High Court in the 1997 Suit that since there was insufficient order placed by the plaintiffs and there was nothing shown in the evidence that could have triggered the payment of cash by the defendants on the outstanding debt due to the plaintiffs, the claim was held to be premature. Following from this, the plaintiffs submitted that it was then possible for the plaintiffs to make fresh orders dated 23 October 2012 for the supply of timber products even after the expiry of the ten months' period and after pronouncement of the judgment in the said 1997 Suit.

**[39]** In support of their action to file a fresh suit due to the premature claim in the 1997 Suit, the plaintiffs relied on the case of *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613, where His Lordship Gopal Sri Ram JCA (as he then was) in a majority judgment held at p 6 line F as follows:

> So far as authority is concerned, the point is, I think, concluded against the appellant by the decision of the Saskatchewan Court of Appeal in *Anglo-Canadian Mortgage Investment Corp v Shaw* (1921) 59 DLR 152, the headnote to which reads as follows:
>
> > If under the terms of an agreement for the purchase of land, a demand for payment is necessary before commencing action, and if prior to launching a first action the plaintiff has in fact made a demand for payment but at the trial of that action has failed to prove the demand and the action is dismissed, a subsequent action will not lie for the same cause, but if in fact no demand has been made, the dismissal of the first action is no bar to recovery in a second action, after demand has been made, because until a demand is made no cause of action exists and any

A action brought before demand is made is premature.

**[40]** The plaintiffs denied any knowledge of the closing down of the first defendant's sawmill factory in July 1998 when it placed the order for the timber products on the 23 October 2012. The plaintiffs contended that the shutting down of the sawmill factory by the first defendant had caused a self-induced frustrating event as the first defendant was unable to meet the order of the plaintiffs after the expiry of 30 days' notice and that would trigger the liability of the first defendant to pay the said outstanding debt in cash.

**[41]** Learned counsel for the plaintiffs further referred to the findings by the learned High Court judge in the said 1997 Suit which he said are limited to the particular evidence and documents adduced by the witnesses in that earlier suit and are not binding upon this court in the present suit particularly on the issue of three further orders allegedly made by the plaintiffs.

**[42]** In the earlier 1997 Suit, the previous High Court in its findings centred on the issue of premature of claim that the plaintiffs have not satisfied the condition of payment as they only concluded one order instead of four orders due to the disagreement over the prices of the timber product. In the present suit, however, the plaintiffs took the position that the first defendant has the prior duty to make the offer to sell timber products and not for the plaintiffs to make the offer to purchase pursuant to cl 2 of the said letter of acknowledgement. Learned counsel for the plaintiffs described the nature of the transaction between the plaintiffs and the defendants as 'reciprocal promises'.

**[43]** It was also the plaintiffs' submission that in the 1997 Suit, the plaintiffs' claim was dismissed because the learned High Court judge was of the view that the evidence adduced by the plaintiffs did not support their pleadings that they had placed not less than four orders through their own company Kamax Trading Ltd based in Taiwan.

**[44]** According to the plaintiffs, in addition to the said one concluded sale, they had in fact made three further orders which were all rejected by the first defendant in breach of the terms of the agreement by the first defendant pursuant to the said letter of acknowledgement.

**[45]** The plaintiffs contended that the evidence in support of the breach of the terms of the letter of acknowledgement by first defendant were only adduced in the present suit with regards to the first defendant's persistent failure to agree with the pricing of the timber product within the ten months'

period which frustrated the conclusion of the three other sales on three occasions illustrated in the following paragraphs.

First occasion

**[46]** On 26 December 1996, the plaintiffs asked the first defendant to give them the best price for 1000 cubic meter of lumber core (p 92 PBOD) and the first defendant agreed to sell to the plaintiffs on 27 December 1996 at the quoted price of USD280 (p 93 PBOD). As a result of the deal, the plaintiffs went to the first defendant's office to finalise the sale but were only told that the timber products had already been sold to another buyer ie Rong Ren Industrial Co Ltd based on the sales contract dated 9 December 1996 (exh 'P1').

Second occasion

**[47]** On 4 January 1997, the plaintiffs asked the first defendant to offer them a reasonable price for the specific size of plywood ie 2.7mm x 1240mm x 2480mm (p 94 PBOD). The first defendant refused to sell and gave the reason that the specified plywood was not within the first defendant's normal product range through a fax dated 6 January 1997 (p 97 PBOD) when it was proven that in the past, the plaintiffs' sawmill had ever sold untrimmed or unsized plywood as seen in the letter dated 14 December 1996 (p 88 PBOD). Furthermore, there is no restriction to export the 'unsized plywood' under the first defendant's licence (pp 84–85 PBOD) contrary to the position taken by the first defendant.

Third occasion

**[48]** On 30 September 1997, the plaintiffs made enquiry for purchase of plywood 30 x 4 x 8' (p 110 PBOD) but the first defendant quoted the high price of USD390/m3 on 6 October 1997 (p 113 PBOD) when the price of plywood (3mm x 1220mm x 2440mm) was only at USD350/m3 in the concluded sale in the earlier month on 6 September 1997 (p 108 PBOD).

**[49]** The plaintiffs contended that despite there was a worldwide recession in the months of November and December 1997 which caused the prices of timber products to go down, the first defendant insisted to quote the unreasonable and high market price for its timber products.

**[50]** Learned counsel for the plaintiffs submitted that the plaintiffs in the present suit are relying on the terms of the said letter of acknowledgement and the claim for the outstanding debt was due to the defendants' breach of the said terms therein which is different from the position taken by the learned High Court judge in the 1997 Suit when His Lordship's said that both learned

counsels for the plaintiffs and the defendants in the 1997 Suits treated the said letter of acknowledgment neither as a contract nor an agreement (p 208 PBOD).

**[51]** Learned counsel for the plaintiffs further submitted that when the learned High Court judge used the words 'enquiries' in His Lordship's judgment in the 1997 Suit to indicate the transactions between the parties apart from the concluded sale, His Lordship actually referred to the rejected offers to purchase by the plaintiffs which evidence were adduced in the present suit.

**[52]** Hence, it was the plaintiffs' submission that the evidence in the present suit shows that there were actually four orders made as out of the four orders, three were rejected by the first defendant in breach of the terms of the letter of acknowledgement.

**[53]** The defendants, on the other hand, submitted that the present suit is caught by the doctrine of res judicata as the plaintiffs' issues in the present suit have already been decided in the 1997 Suit. The similarities of the claim in the present suit and the claim in the 1997 Suit are described by learned counsel for the defendants in the following paragraphs.

**[54]** Although the counsels representing both parties in the present suit and in the earlier 1997 Suit are different, the parties are the same.

**[55]** The cause of actions in both suits are based on the same letter of acknowledgement dated 12 November 1996 as against the first defendant and the same letter of undertaking dated 12 November 1996 as against the second defendant.

**[56]** The subject matters in both suits are also the same which is based on the alleged outstanding sum of RM6,223,241 due to the plaintiffs under the said letter of acknowledgment.

**[57]** The facts and evidence adduced by the plaintiffs in the present suit are substantially the same with that of the 1997 Suit and the issues raised by the plaintiffs in this present suit are substantially the same with those that have been raised and/or could have been raised in the 1997 Suit.

**[58]** Learned counsel for the defendants submitted that all the above issues regarding the plaintiffs' order to purchase the timber products as contemplated in the said letter of acknowledgement (including the three further unsuccessful

orders) and the natural constructions of cll 2 and 5 of the same have been considered by the learned High Court judge in the 1997 Suit.

**[59]** Learned counsel for the defendants further submitted that the learned High Court judge in the 1997 Suit had made his findings on the liabilities of the defendants under the said letter of acknowledgement and the said letter of undertaking after considering all relevant issues and held that the claim of the plaintiffs is premature.

**[60]** On issues relating to reciprocal promises, pre-existing liabilities, self-induce frustration and undue enrichment, learned counsel for the defendants submitted that all these issues are relevant to the 1997 Suit which were not raised by the plaintiffs either deliberately or inadvertently. Such issues are therefore caught by the doctrine of res judicata in its wider sense.

**[61]** Now, the issues as to whether there was sufficient or insufficient orders made by the plaintiffs; whether if there were sufficient orders placed by the plaintiffs but they were not successful due to the first defendant's refusal to sell or purposely frustrate the sale by quoting a higher price than usual; and, the correct interpretation of cl 2 of the letter of acknowledgement that the first defendant should have made the offer to sell first thereby relieving the plaintiffs from making the orders, in my view, are issues relevant to the 1997 Suit and should have been ideally raised in that 1997 Suit.

**[62]** Likewise, although the plaintiffs' statement of claim was amended to include 'frustration' to enable the plaintiffs to adduce evidence regarding the alleged three further orders which were rejected by the first defendant due to self-induced frustration, they are still matters within the purview of the 1997 Suit as all these transactions arose during the process of the agreement for settlement of the debt by way of contra payment or set off from the supply of timber products by the first defendant pursuant to the agreed terms of letter of acknowledgement.

**[63]** However, in the present suit, the plaintiffs also claim for the fresh order of timber products they made on 23 October 2012 after the expiry of the ten months' period as per the term of the letter of acknowledgment and subsequent to the pronouncement of the judgment in the 1997 Suit. This fresh order in 2012 is made possible since the previous High Court held that the plaintiffs' claim is premature due to incomplete orders which finding is confirmed and upheld by the Federal Court.

**[64]** It is also pertinent to note that there was also a striking out application filed by the defendants against the plaintiffs' claim in the present suit and this matter also went up to the Federal Court where the defendants' leave

application to appeal against the Court of Appeal's decision in dismissing the striking out order given by the High Court was also dismissed. This only goes to show that the Federal Court is of the view that the principle of res judicata had no application in this case.

**[65]** Based on the principle of stare decisis, I also take the same view that the plaintiffs' present claim vide their amended statement of claim dated 10 May 2013 (as amended on 15 May 2017) is not caught by the doctrine of res judicata.

**[66]** I also refer to the authority of *The Pacific Bank Berhad* to support my view that the dismissal of the plaintiffs' claim in the 1997 Suit on the ground of premature is not a bar to the recovery of said debt in the present suit since the parties could not agree with the pricing of the timber product to conclude further sale within the stipulated ten months' period.

**[67]** I also find support from the decision of both the previous High Court and the Court of Appeal based on the same facts as in the present suit that although the orders were not made within the ten months stipulated period under the letter of acknowledgement, there is no bar for the plaintiffs from recovering their said debt against the defendants due to the absence of any provision regarding the extinguishment of the said debt by the failure of the plaintiffs to place the necessary orders for timber product from the first defendant within the said stipulated period.

*Whether the plaintiffs' claim is time-barred under the provision of the Sabah Limitation Ordinance?*

**[68]** The plaintiffs disagreed with the defendants that their claim was time-barred as both parties in the present suit were actively involved throughout the litigation process from the date when the suit was filed ie 22 November 1997 until it was finally decided by the Federal Court on 7 September 2009.

**[69]** It was, therefore, the plaintiffs' submission that the six years limitation period was suspended, adjourned or postponed and thus must be excluded in the calculation for the limitation period. Furthermore, the placement of order attempted by the plaintiffs in 2012 did not materialise due to the first defendant's self-induced frustration when it closed down its' sawmill factory in July 1998.

**[70]** The defendants submitted that the plaintiffs' claim is statute barred pursuant to item 95 of the Schedule to the Limitation Ordinance which provides for six years limitation period from the time when the contract is

broken, or when where there were successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases.

**[71]** The defendants further submitted that based on the plaintiffs' own pleadings and witness statement, they had issued a letter demand dated 15 September 1997 and 27 October 1997 to both the first and second defendants respectively (pp 117 and 120 of PBOD) to recover the said outstanding debt of RM6,223,241 prior to the institution of the 1997 Suit.

**[72]** It was, therefore, the defendants' submission that the cause of action to recover the outstanding sum of RM6,223,241 had accrued or arose in the month of September or October 1997 and the six years limitation period would have been expired in the month of September or October 2003. The present suit was however filed in May 2013, some ten years after the expiry of the limitation period.

**[73]** On the issue of limitation, I agree with the submission of learned counsel for the plaintiffs that the plaintiffs' claim in the present suit is not time-barred as parties are actively involved during the process of litigation in the 1997 Suit when the said suit was filed on 22 November 1997 until it was finally decided on 7 September 2009 by the Federal Court after the appeal arising from the High Court and the Court of Appeal.

**[74]** The present suit dated 10 May 2013 which was filed within six years after the matter was disposed off by the Federal Court in 2009. It is not disputed that the present suit has again went through another round of appeal to the Federal Court on the issue of the striking out application filed by the defendants against the plaintiffs' action on the ground of res judicata.

**[75]** the defendants' had filed their review application to the Federal Court after the Federal Court refused their leave application to appeal in 2017 whilst the plaintiffs are still pursuing and defending their rights under the said letter of acknowledgement. The parties' actions demonstrated above, in my view, have effectively suspended the operation of the limitation period for the present suit.

**[76]** On the 11 June 2018, this court had been informed that the defendants have finally withdrawn their said review application in the Federal Court.

*Whether the first and second defendant are liable to pay the outstanding debt based on the said letter of acknowledgement and letter of undertaking when only one sale was completed?*

**[77]** The plaintiffs submitted that the defendants are bound by their own admission through their letter of acknowledgement and the letter of undertaking both dated 12 November 1996.

**[78]** Through the same letter of acknowledgement, the first defendant also undertook to pay for the said debt by way of supply of timber products to be manufactured by the first defendant to the plaintiffs.

**[79]** The plaintiffs further submitted that the above judicial admission of the said debt by the defendants must be held against them (*Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478). It was the plaintiffs' case that the defendants through their conducts had intentionally making it difficult for the parties to conclude a sale by making multiple excuses.

**[80]** It was the defendants' submission that they were not liable to the plaintiffs based on the clear terms of the letter of acknowledgment that the said outstanding sum of RM10,134,000 and interest shall only be settled by way of deduction from or set off against timber products at a price based on prevailing market price to be ordered by the plaintiffs and supplied by the first defendant over four orders or shipments within the period of ten months from 12 November 1996.

**[81]** It was also the defendants' case that the plaintiffs had failed to prove that they have placed at least four orders or shipments during the ten months' period. The evidence in both the present suit and in the 1997 Suit showed that the plaintiffs had only placed one order for the timber products for the purpose of the set off of the said outstanding debt.

**[82]** During the trial of the 1997 Suit, the first plaintiff admitted that they had only concluded one business deal although there were many enquiries as recorded in paras 7–8, p 126 of DBOD and paras 27–28, p 128 of DBOD. The second plaintiff too admitted that only one sale was concluded and said there were more than ten incomplete sales during the period (Q&A55, p 31 of notes of proceedings).

**[83]** It was further the defendants' submission that the plaintiffs are not entitled to the payment of the said debt by way of cash in the present suit or in the 1997 Suit provided any of the triggering events under cl 5 of the letter of acknowledgment thereof had occurred. The plaintiffs had not shown any of these events ie the first defendant had refused to sell the timber products or failed to offer the timber products as there was no notice in writing issued to the first defendant by the plaintiffs.

**[84]** In respect of the second defendant's liability under the letter of

undertaking, it was the defendants submission that second defendant's liability is hinged on the finding of liability of the first defendant under the said letter of acknowledgment. As it was the defendants' case that the plaintiffs had failed to prove their claim against the first defendant, the claim against the second defendant must also fail.

**[85]** In my view, although the said debts were admitted, the payment of which is only based on the agreed term of the letter of acknowledgement that is by way of contra and set off against the purchase price of the sale and supply of timber products over the period of ten months.

**[86]** It was not disputed that the parties had only concluded one contract for sale of timber products at a mutually agreed price on 6 September 1997 which was already set off from the total amount of the said debt due to the plaintiffs based on the term of the letter of acknowledgment.

**[87]** On whether the defendants are liable to the admitted debt based on the letter of acknowledgment and the letter of undertaking is depending upon whether there were sufficient sales concluded over the period of ten months from the date of the letter of acknowledgment ie 12 November 1996. This is because no payment can be made by way of contra and set off if there was no sale of the timber products in the first place.

**[88]** Based on the available evidence, the defendants could not be liable to pay the outstanding debt based on the said letter of acknowledgement and letter of undertaking when only one sale was concluded.

*Whether there were three other orders placed by the plaintiffs in addition to the one concluded sale which were not materialised either because of the first defendant refused to sell or quoted a high price than*

**[89]** The plaintiffs' case is that there were three other orders made by the plaintiffs for the supply of timber products apart from one concluded sale but they were frustrated by the first defendant's actions.

**[90]** The said three orders were allegedly made on 26 December 1996, 4 January 1997 and 30 September 1997 and the plaintiffs produced the documentary evidence at pp 92–94, 97–88, 110, 113 and 108 of PBOD. For the order on 26 December 1996, it was the plaintiffs' contention that the defendants had breached their own quotation which was accepted by the plaintiffs when the first defendant sold the timber products to another buyer. For the order on 4 January 1997, it was the plaintiffs' contention that the defendants unwillingness to sell the timber product was not supported with

A good reasons. For the order on 30 September 1997, it was the plaintiffs' contention that the price for the timber products quoted by the first defendant was too high.

B **[91]** The plaintiffs submitted that the reason why the parties could not proceed with the concluded sales is because of the first defendant's persistent refusal to sell and/or the price quoted by the first defendant was too high.

C **[92]** The plaintiffs further submitted that by the defendants' own actions, it showed that they had waited for the said period of ten months under the letter of acknowledgement to expire and then claimed that the said debt had been written off. This excuse by the defendants should not be allowed by the court.

D **[93]** It was the defendants' submission that although it is the plaintiffs' pleaded case that the first defendant had intended to quote ridiculously high prices and refused to agree on the prices for the timber products before instituting the 1997 Suit (paras 9–11, pp 4–5 of BOP), the second plaintiff during his testimonies departed from their pleaded case by contending that the first defendant had allegedly just simply refused to sell timber products to them E (Q&A6 and Q&A7 of WS-PW2 and Q&A62 to Q&A65, pp 38–39 of notes of proceedings).

**[94]** The defendants submitted that the second plaintiff was not able to adduce any evidence to support his contention and even if the plaintiffs alleged F three further orders were true, and the said three orders were frustrated by the actions of the first defendant by simply refusing to sell, the plaintiffs failed to prove that the required 30 days' notice in writing had been given to the first defendant after the alleged incidents or conducts complained of by the plaintiffs.

G

**[95]** The defendants further submitted that the plaintiffs had failed to produce any official document like a quotation from the timber industry if there was any truth that the first defendant had quoted high prices which were not based on the prevailing market rate.

H

**[96]** In fact, it was the second plaintiff's evidence under cross-examination that he agreed that the prices quoted by the first defendant were reasonable and subject to negotiation and can be reduced although he later changed his evidence but still maintained that the prices can be reduced a little (see answer I to second put question after Q&A61, p 34 of notes of proceedings and answer to first put question at p 35 of notes of proceedings). Further, the second plaintiff in his evidence also confirmed that the price for plywood is not certain and it can go up and down in a short period of time (Q&A61, p 34 of notes of proceedings).

**[97]** In the present suit, the plaintiffs alleged that they have made three further enquiries for the purchase of the timber products from the first defendant but the evidence to support these enquiries as admitted by the plaintiffs were not before the High Court in the 1997 Suit. A

**[98]** The plaintiffs had given evidence that the three enquiries were made by the plaintiffs on 26 December 1996, 4 January 1997 and 6 October 1997 but they were all unsuccessful. On the first enquiry ie 26 December 1996, the plaintiffs alleged that the first defendant refused to sell the requested timber product to the plaintiffs as the first defendant had already sold it off to someone else; on the second enquiry ie 4 January 1997, the first defendant told the plaintiffs that the specific size of timber product requested by the plaintiffs were not within the first defendant's normal product range when the first defendant's licence shows that there is no restriction to export the 'unsized' plywood; and, for the third enquiry ie 6 October 1997, the plaintiffs alleged that the first defendant had quoted the plaintiffs with a higher price than the first defendant's earlier quotation. B C D

**[99]** It is my view that the above enquiries were merely enquiries made by the plaintiffs for quotation of the price for the timber products from the first defendant. It cannot be considered as a formal offer by the plaintiffs to purchase the timber products because an offer to purchase can only be made once the parties have agreed on the pricing pursuant to the term of the letter of acknowledgment. E

**[100]** It is also my view that although the purported plaintiffs' offer to purchase the timber products as shown by the documentary evidence were admitted as exhibits in the plaintiffs' bundle of document ie PBOD, it does not, however, exonerate the plaintiffs from proving its contents to the satisfaction of this court. F G

**[101]** These documents at pp 92–94, 97, 88, 110, 113 and 108 of PBOD were copies of the originals which were not produced in court and its contents most of it are illegible. They appeared to be handwritten statements on them with Chinese characters and there was also translation copies of the documents which were not verified and confirmed by the maker. H

*If the above issue is proven, whether the first defendant's failure to fulfil the three remaining orders for timber products under the first defendant's letter dated 12 November 1996, is a self-induced frustration?* I

**[102]** As the plaintiffs could not prove that there were such three further orders to purchase timber products from the first defendant and there was no evidence adduced by the plaintiffs on the refusal by the first defendant to sell

timber product and/or the higher price quoted by the first defendant, and there were no notices given by the plaintiffs pursuant to cl 5 of the letter of acknowledgment, the first defendant cannot therefore be said to have failed to fulfil the plaintiffs' remaining orders. The plaintiffs' allegation of self-induced frustration must fail.

*Whether the placement of order by the plaintiffs made in 2012 is a sham order?*

**[103]** It was the plaintiffs' pleaded case that it placed an order dated 23 October 2012 for timber products but the first defendant had failed to comply with the plaintiffs' order as the first defendant claimed that the sawmill had been closed down.

**[104]** The plaintiffs submitted that as a result of the first defendant's failure to supply, a notice dated 31 October 2012 was issued to the first defendant requesting the first defendant to ship the remaining timber products. When the timber products were still not forthcoming, the plaintiffs sent a letter dated 5 December 2012 to the first defendant to notify the latter about the cancellation of the purchase order and to demand for an immediate cash payment of RM6,223,241. The plaintiffs also issued a letter dated 11 December 2012 to the second defendant to claim for the same amount with interest.

**[105]** The plaintiffs submitted that there was no evidence by the first defendant that the first defendant's sawmill being closed down except by saying that the information about it was readily available during the trial in the 1997 Suit.

**[106]** The plaintiffs further submitted that even if it was true that there was a closing down of the first defendant's sawmill (which is denied), this will be a self-induced frustration by the defendants. This is because the first defendant had undertaken to pay the admitted debt by way of timber products and yet the first defendant felt it was alright to close down the first defendant's sawmill before it could complete the supply of the timber products to the plaintiffs.

**[107]** It was the defendants' submission that despite their pleaded case, the plaintiffs had inexplicably failed to adduce any evidence on the purported purchase order dated 23 October 2012, the purported notice dated 31 October 2012 and the purported letters of demand both dated 5 December 2012 and 11 December 2012 to the first and second defendants respectively, allegedly issued by the plaintiffs. Without the above being proved, in particular, the required 30 days' notice in writing, the plaintiffs would not be entitled to cancel the order and demand for cash payment from the first defendant based on cl 5 of the letter of acknowledgement.

**[108]** Regarding the closing down of the first defendant's sawmill, the defendants submitted that the defendants' witness, Tan Kim Chuan @ Tan Say Lay (DW2), the then general manager of the first defendant during the trial of the 1997 Suit had testified that the first defendant's factory had stopped operation in July 1998 as recorded in paras 14–16 of p 40 of the notes of proceedings (p 148 of DBOD). When the same witness ie DW2 was again called as a witness for this present suit by the defendants, he had reconfirmed that the said sawmill had been closed down since July 1998 and had never reopened.

**[109]** The defendants further submitted that the above fact or evidence given by DW2 had never been challenged by the plaintiffs during the trial of the 1997 Suit and also in the present suit. This same fact regarding the closure of the first defendant's factory was also mentioned by the learned High Court judge in His Lordship's grounds of decision in the 1997 Suit (p 189 of DBOD) and also in the Federal Court's decision (para I, p 237 of DBOD).

**[110]** On the issue of the self-induced frustration alleged by the plaintiffs, it was the defendants' contention that it had never claimed that the closing down of the first defendant's sawmill since July 1998 had rendered it impossible for the first defendant to perform its obligations under the said letter of acknowledgement. On the contrary, it was the defendants' submission that based on the evidence adduced in the trial, the purported purchase order made by the plaintiffs on 23 October 2012 for the supply of the remaining timber products is a sham order as the plaintiffs by then knew that the first defendant had already ceased to produce timber products and no longer operate a sawmill in July 1998.

**[111]** It is pertinent to note that if the plaintiffs' order for the supply of the timber products in 2012 was true, it was made after the expiry of the ten months' period stipulated under the letter of acknowledgment.

**[112]** It is also crucial to note that if the order placed by the plaintiffs in 2012 was true, the first defendant's sawmill factory was no more in operation then since it was closed down commencing July 1998 which fact was fully known by the plaintiffs during the trial in the 1997 Suit.

**[113]** Thus, I agree with the submission by learned counsel for the defendants that the plaintiffs' order in 2012 if any was a sham order using the term under cl 5 of the letter of acknowledgement as a tactical manoeuvre to claim for cash payment despite the fact that it was made beyond the timeline and their knowledge of the closing down of the first defendant's sawmill factory at the time when the order was placed.

**[114]** The plaintiffs had also failed to prove through the evidence of their witnesses on the purported order for the remaining timber products they allegedly made in 2012, the type of timber being ordered, the price being quoted or negotiated for the timber products, the first defendant's refusal or neglected to deliver the timber products and the plaintiffs' cancellation of the purchase order which makes their claim to suffer from the same fate of being dismissed on the ground of premature.

**[115]** Although the said order in 2012 was pleaded by the plaintiffs and despite the clear admission by the defendants on the closing down of the first defendant's sawmill, it does not obviate the plaintiffs from the need to present evidence in court. The said 2012 order must be strictly exhibited to the court together with the other documents which were allegedly issued by the plaintiffs to support their claim for cash payment of the outstanding debt pursuant to cl 5 of the letter of acknowledgement.

*Whether cl 2 of the letter of acknowledgement requires the first defendant to first offer for sale and then for the plaintiffs to purchase the timber products*

**[116]** In interpreting cl 2 of the letter of acknowledgement, learned counsel for the plaintiffs submitted that based on the law on reciprocal promises and given the interpretation of that clause by way of *contra proferentum rule*, it is for the first defendant to first make an offer to sell and the plaintiffs shall then purchase the same. The first defendant's unwillingness to make any offers to sell means that they have breached the terms of the said letter of acknowledgement.

**[117]** It was the plaintiffs' submission that this court has to consider the natural order in which the parties are to perform their respective obligations and the order of performance as per the said letter of acknowledgement imposes a duty on the first defendant to offer to sell before the plaintiffs can accept the offer which is consistent with the undisputed fact that the first defendant has a pre-existing liability to pay up the said debt.

**[118]** It was also the plaintiffs' submission that the manner of payment of the said debt under cl 4 of the said letter of acknowledgment which states that '… the Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set off against the Timber Products Price' must be read together with cl 2 of the letter of acknowledgment in respect of the first defendant's duty 'to sell' timber products.

**[119]** The plaintiffs further submitted that the only logical and natural interpretation of the said letter of acknowledgement is that upon the expiry of the stipulated period, the balance of the said debt should be payable on demand in cash.

**[120]** The defendants submitted that the plaintiffs could not have sustained in claiming that the first defendant has the prior duty to make an offer to sell the timber products first, thus relieving the plaintiffs from making the order first as it was not only not pleaded by the plaintiffs but also cl 2 of the said letter of acknowledgement could not possibly be interpreted in the manner argued by the plaintiffs.

**[121]** It was the defendants' submission that cl 2 of the letter of acknowledgement must be read together with cl 5 of the same which states '… to supply any of the timber products ordered by you …'. From the wordings of cl 5, it clearly shows that the sequence or order in which the reciprocal promises pertaining to the sale and supply of the timber products is that the plaintiffs must place the order first before the first defendant can supply.

**[122]** It was further submitted by the defendants that the fact that the first defendant had a pre-existing liability does not necessarily mean that the first defendant must first make the offer to sell because both cl 5 of the letter of acknowledgement and the 'nature of the transaction' in the present case would require the plaintiffs to first make the enquiry and to place the order before the first defendant can sell and supply the timber products. In addition, the first defendant would not know what type of timber products or their quantities the plaintiffs want without them first making the order.

**[123]** In respect of the plaintiffs' submission that upon the expiry of the ten months' period, the balance of the outstanding sum should be payable on demand in cash, the defendants submitted that this is not sustainable because firstly, there is no provision in the said letter of acknowledgement that the plaintiffs are automatically entitled to cash payment after the expiry of the ten months' period, and secondly, the triggering events as provided in cl 5 of the letter of acknowledgement for the cash payment to be made has not arisen and has never been proven by the plaintiffs.

**[124]** Clause 2 of the letter of acknowledgment states that 'we shall sell and you shall purchase timber products manufactured by us…'. Learned counsel for the plaintiffs submitted that the clause requires the first defendant to make an offer to sell the timber products first. I disagree with this interpretation because such an interpretation would not be consistent with cl 5 of the letter of acknowledgement which clearly stated that the first defendant shall supply the timber products as ordered by the plaintiffs.

**[125]** The relevant part of cl 5 of the letter of the acknowledgement issued by the first defendant to the plaintiffs stated as follows:

> in the event that we shall fail, refuse and/or neglect to supply any of the Timber Products *ordered by you* or if any of the Timber Products supplied by us shall not be

A in accordance with the specifications stated in your purchase order(s) ...

**[126]** I am more inclined to agree with learned counsel for the defendants' interpretation that orders have to be made first by the plaintiffs before the first defendant can supply the timber products otherwise the first defendant would not be in the position to know what types of timber products or their quantities that were required or needed by the plaintiffs at any particular point of time without they first making the enquiry and confirm the order.

*Whether the first and second defendants would be unjustly enriched for non-payment of the monies admitted to be due to the plaintiffs in the first defendant's letter of acknowledgement dated 12 November 1996?*

**[127]** It was the plaintiffs' submission that the defendants would be unjustly enriched if they were allowed to simply write off the said debt after the expiry of the ten months' period. The plaintiffs further submitted that the sales could not be concluded due to the defendants' own failure to perform their part of the bargain within the said ten months' period.

**[128]** The plaintiffs had been chasing for the said debt even after the expiry of the said ten months' period by issuing a letter of demand dated 15 September 1997 to the first defendant (p 117 PBOD) which goes to show that the defendants' obligation to pay the said debt has never been waived by the plaintiffs. There is, therefore, no basis for the defendants not paying the balance of the said debt due to the plaintiffs when the same was admitted albeit on reduced sum and although the period of ten months has expired.

**[129]** It was the defendants' submission that the relief of an equitable principle of unjust enrichment does not work in favour of the plaintiffs in view of their conduct in prosecuting their claim. It was further argued that the plaintiffs are guilty of laches as the plaintiffs could and should have but failed to place the further order for the timber products immediately after the High Court had dismissed their claim in the 1997 Suit on 29 July 2000. The plaintiffs should have filed the present suit immediately after placing the order and not waited until the disposal of the appeal by the Federal Court in 2009.

**[130]** It was also the defendants' submission that although both the first and second plaintiffs denied having any knowledge that the first defendant's sawmill had ceased operation since July 1998, the evidence showed that both the plaintiffs knew and ought to know of this fact. This can be gleaned through from the second plaintiff's evidence when he confirmed in cross-examination that he heard all the testimonies or evidence given by the defendants' witnesses during the trial of the 1997 Suit (Q&A50, p 29 of notes of proceedings).

**[131]** The defendants submitted that the second plaintiff must have heard DW2's evidence during the trial of the 1997 Suit on 22 April 1999 that the first defendant had only produced plywood products until June 1998 and by July 1998, its factory operation had stopped as recorded in paras 14–16 of p 40 of the notes of proceedings (p 148 of DBOD). A B

**[132]** Based on the above, the defendants submitted that no such relief should be allowed.

**[133]** I agree with learned counsel for the defendants that the plaintiffs could not have succeeded in their claim based on the equitable principle of unjust enrichment as the nature of the claim in the present suit is different. C

**[134]** The present suit is based on the admitted debt to be made payable by way of contra payment and set off against the sale and supply of the timber products by the first defendant. There was no payment made by the first defendant because there was no sale of timber product concluded between the first defendant and the plaintiffs. The plaintiffs was also not entitled to cash payment otherwise on the happening of the events as envisaged under cl 5 of the letter of acknowledgment. D E

**[135]** In the present suit, there was no act or delivery of thing that can be said to have been done gratuitously that had benefitted the defendants. F

*If the defendants are liable, whether the outstanding debt had been reduced to RM5,431,454.87 instead of RM6,223,241 as at 15 September 1997 contended by the plaintiffs?*

**[136]** It was the plaintiffs' contention that the defendants is owing the sum of RM6,223,241 which is the principal sum in the present suit and in the 1997 Suit. Based on the plaintiffs' letter of demand dated 15 September 1997 (p 117 of PBOD) issued by Messrs Shim Pang & Co (the plaintiff's previous solicitors) the sum claimed by the plaintiffs as owing by the defendants is RM6,144,489. G H

**[137]** The plaintiffs submitted that there was no basis for the deduction of expenses allegedly incurred by the plaintiffs during their term of office as directors in the first defendant for the following reasons: I

(a) the expenses on pp 246–461 of DBOD are in respect of the period from 3 July 1995–26 November 1996 which were before the date of the share sale agreement. During that period, the plaintiffs were still directors and shareholders in the first defendant. These expenses must have already

A been considered and taken into account by the defendants in the drafting of the said share sale agreement. The defendants should have called their accountant to explain why these expenses were not deducted before the date of the said share sale agreement;

B (b) these items from pp 462–463 of DBOD are for the period 18 December 1996–16 January 1997 after the said share sale agreement and were normal expenses incurred by directors. The plaintiffs only resigned as directors of the first defendant on 12 February 1997 (pp 115–116 PBOD). Again, the defendants should have called their accountant to C explain why these expenses were not deducted before the date of the said share sale agreement; and

(c) these items from pp 464–470 of DBOD are for the period 25 February 1997–15 April 1997 when the plaintiffs were no longer the directors of the first defendant and cannot be responsible for those expenses. Once D again, the defendants should have called their accountant to explain why these expenses were not deducted before the date of the said share sale agreement.

E **[138]** The plaintiffs further submitted that during and throughout the plaintiffs' tenure as directors for the first defendant, the plaintiffs had never agreed to deduct those expenses from the said debt. Therefore, it is ridiculous for the defendants to deduct these expenses from the said debt after the plaintiffs have resigned.

F

**[139]** It was the defendants' contention that the outstanding sum due to the plaintiffs was reduced to RM5,431,454.87 (see the first defendant's letter dated 10 November 1997 (p 66 of DBOD)) after taking into account the various expenses incurred during the time when the plaintiffs were the directors of the G first defendant.

**[140]** The first defendant's statement of account (p 67 of DBOD) shows the various deductions being made on top of the value of the timber products H amounting to RM5,128,550.11.

**[141]** During the examination-in-chief, the first plaintiff testified that they had never agreed to set off or deducted the following expenses from the outstanding sum due:

I (a) for the period from 3 July 1995 to 26 November 1996 (where the plaintiffs were still the directors and shareholders of the first defendant) as shown at pp 246–461 of DBOD; and

(b) for the period from 18 December 1996 to 16 January 1997 (where the plaintiffs were still the directors of the first defendant) as shown at pp 462–463 of DBOD.

**[142]** In respect of the expenses for the period from 25 February 1997–15 April 1997 (when the plaintiffs were no longer the directors of the first defendant) as shown at pp 464–470 of DBOD, first plaintiff claimed that the plaintiffs should not be held responsible (Q&A13 of WS-PW1).

**[143]** During the cross-examination, the first plaintiff, however, appeared to suggest that in respect of the expenses in payment voucher at pp 433–436 of DBOD which were summarised in pp 246-249 of DBOD (Q&A24, p 14 of notes of proceedings) these had already been deducted before 12 November 1996 (Q&A25, p 15, Q&A27, p 16 and Q&A28, p 17 of notes of proceedings).

**[144]** It was the defendants' submission that the first plaintiff's evidence in cross-examination had contradicted his evidence given during examination-in-chief in Q&A13 of WS-PW1.

**[145]** It was also the defendants' submission that if the plaintiffs were to disagree with the first defendant's said letter and statement of account (pp 66–67 of DBOD) which are in respond to the plaintiffs' letter of demand dated 15 September 1997 and 27 October 1997 (pp 117 & 120 of PBOD), the plaintiffs or their then said solicitors would have replied and disputed the deductions which they have failed to do.

**[146]** There was no evidence at all adduced by the first plaintiff to show that all those expenses at pp 246–249 of DBOD had been cleared or deducted before 12 November 1996.

**[147]** The defendants contended that the first defendant's said letter and statement of account (pp 66–67 of DBOD) are already part of the evidence adduced in the 1997 Suit but surprisingly the plaintiffs had never mentioned anything about the deductions having been made before 12 November 1996.

**[148]** As the plaintiffs' claim could not have been sustained for the reasons I have mentioned above, the issue on whether the outstanding debts due from first defendant is in the sum of RM6,223,241 or on a reduced sum of RM5,431,454.87 can be considered to be inconsequential.

A CONCLUSION

**[149]** Having evaluated the evidence and the submission by both parties, I do not see how the plaintiffs can succeed in claiming the admitted outstanding debt when the plaintiffs by their own conduct had failed to comply with the express and clear terms of the letter of acknowledgement.

**[150]** I also do not see how the plaintiffs can claim for cash payment from the first defendant pursuant to cl 5 of the letter of acknowledgement when there was no evidence adduced by the plaintiffs that the first defendant had refused to sell the timber product or if the timber products are sold, they were not in accordance with the specification or defective which give the plaintiffs the right to cancel the order and to claim for cash payment upon the expiry of the specified period.

**[151]** The parties had agreed to deal with the subject matter of the outstanding debt in accordance with the letter of acknowledgement, their conduct must therefore be subject to the terms of the said agreement. No other interpretation could have been made in the face of the plain and express provision of cll 2 and 5 of the letter of acknowledgement. If the first defendant had failed or refused to sell the plaintiffs' three further orders as alleged, the plaintiffs could have exercised their right under cl 5 of the letter of acknowledgement but they did not.

**[152]** In the case of *Tang Meng Hock v Tang Ming Seng* [2010] 1 MLJ 33, the Court of Appeal held as follows:

> ... As the words used in the contract were clear and unambiguous, it was the duty of the court to give effect to the bargain of the parties according to their intention in writing by looking at the words used. The parties were bound by what they have agreed to and neither party could unilaterally revoke the contract or go against it.

**[153]** In *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 3 CLJ Rep 37, Lim Beng Choon J referred to the *National Coal Board v WM Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 where it is said at p 560:

> ... where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence ... a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; ... the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

**[154]** His Lordship Lim Beng Choon J in the above case also cited the case

of *Central Bank of India v Hartford Fire Insurance Co Ltd* [1965] AIR SC 1288, where the Supreme Court of India followed the second principle advocated in *WM Neill & Son (St Helens) Ltd* when it says at p 1290:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

**[155]** This is the position that I am holding tight and it remains so although there is nothing in the terms of the agreement to say that the said liability towards the outstanding debt shall be extinguished if there are insufficient orders made within the said ten months' period.

**[156]** The plaintiffs, in fact, had been given a second chance to outline their case by introducing a new cause of action pertaining to the order made in 2012 in the present suit but failed to adduce evidence and to prove their claim.

**[157]** Consequently, based on my findings above, the plaintiffs' claim is hereby dismissed.

*Plaintiff's claim dismissed with costs of RM10,000 subject to payment of allocator.*

Reported by Mohd Kamarul Anwar